

the filing shall be provided with the filing.

(b)(1) All data and information referred to, or in any way relied upon, in any filings made under this part shall be included in full and may not be incorporated by reference, unless the data or information is contained in the administrative record for the decision being appealed.

(2) Notwithstanding paragraph (b)(1) of this section, State or Federal statutes, regulations, and judicial decisions published in a national reporter system, officially issued EPA documents of general applicability, and any other publicly and generally available reference material may be incorporated by reference. Any person incorporating such materials by reference shall provide copies of the materials as instructed by the Environmental Appeals Board or the Presiding Officer.

(3) If any part of any filing is in a foreign language, it shall be accompanied by an English translation verified by the person making the translation, under oath, to be complete and accurate, together with the name, address, and a brief statement of the qualifications of the person making the translation. Translations filed of material originally produced in a foreign language shall be accompanied by copies of the original material.

(4) Where relevant data or information is contained in a document also containing irrelevant matter, either the irrelevant matter shall be deleted or an index to the relevant portions of the document shall be included in the document.

(c)(1) Failure to comply with the requirements of this section or any other requirement in this part may result in the noncomplying portions of the filing being excluded from consideration. If the Environmental Appeals Board or the Presiding Officer determines on motion by any party or *sua sponte* that a filing fails to meet any requirement of this part, the Environmental Appeals Board or Presiding Officer may return the filing, together with a reference to the applicable requirements on which the determination is based. A person whose filing has been rejected has 7 days (or other reasonable period established by the Environmental Ap-

peals Board or Presiding Officer), from the date the returned filing is mailed, to correct the filing in conformance with this part and refile it.

(2) The making of a filing shall not mean or imply that the filing, in fact, meets all applicable requirements, that the filing contains reasonable grounds for the action requested, or that the action requested is in accordance with law.

(d) An original and two copies of any written filing under this part shall be filed with the Environmental Appeals Board unless a proceeding is pending before a Presiding Officer, in which case they shall be filed with the Hearing Clerk (except as provided under § 78.19(d)) of this part.

(e)(1) The party making any filing in a proceeding under this part shall also serve a copy of the filing on each party to the proceeding, or, with regard to a petition for administrative review, on the persons specified in § 78.3(b)(3) of this part.

(2) Every filing made under this part shall be accompanied by a certificate of service citing the date, place, time, and manner of service and the names of the persons served.

(f) The Hearing Clerk will maintain and furnish, to any person upon request, the official service list containing the name, service address, telephone, and facsimile numbers of each party to a proceeding under this part and his or her attorney or duly authorized representative.

(g) Affidavits filed under this part shall be made on personal knowledge and belief, set forth only those facts that are admissible into evidence under § 78.5 of this part, and show affirmatively that the affiant is competent to testify to the matters stated therein.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 62 FR 66279, Dec. 18, 1997]

#### **§ 78.5 Limitation on filing or presenting new evidence and raising new issues.**

(a) Where there was an opportunity for public comment, or a claim of error notification was submitted, prior to the decision that is subject to appeal, no evidence shall be filed or presented, and no issues raised, in a proceeding

## Environmental Protection Agency

## § 78.9

under this part that were not filed, presented, or raised during the public comment period, absent a showing of good cause explaining the party's failure to do so during the public comment period or in the claim of error notification. Good cause shall include any instance where the party seeking to file or present new evidence or raise a new issue shows that the evidence could not have reasonably been ascertained, filed, or presented, the issue could not have reasonably been ascertained or raised, or that the materiality of the new evidence or issue could not have reasonably been anticipated, prior to the close of the public comment period or the period for submitting a claim of error notification.

(b) If an evidentiary hearing is granted, no evidence shall be filed or presented on questions of law or policy or on matters not subject to challenge in the evidentiary hearing.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

### **§ 78.6 Action on petition for administrative review.**

(a) If no evidentiary hearing concerning the petition for review is requested or is to be held, the Environmental Appeals Board will issue an order under § 78.20(c) of this part.

(b)(1) The Environmental Appeals Board may grant a request for an evidentiary hearing, or schedule an evidentiary hearing *sua sponte*, if the Environmental Appeals Board finds that there are disputed issues of fact material to contested portions of the decision and determines, in its discretion, that an opportunity for direct- and cross-examination of witnesses may be necessary in order to resolve these factual issues.

(2) To the extent the Environmental Appeals Board grants a request for an evidentiary hearing, in whole or in part, it will:

(i) Identify the portions of the decision that have been contested, and the disputed factual issues that have been raised by the petitioner with regard to which the evidentiary hearing has been granted; and

(ii) Refer the disputed factual issues to the Chief Administrative Law Judge for decision and, in its discretion, may

also refer all or a portion of the remaining legal, policy, or factual issues to the Chief Administrative Law Judge for decision.

(3)(i) After issues are referred to the Chief Administrative Law Judge, he or she will designate an Administrative Law Judge as Presiding Officer to conduct the evidentiary hearing.

(ii) Notwithstanding paragraph (b)(3)(i) of this section, if all parties waive in writing their right to have an Administrative Law Judge designated as the Presiding Officer, the Administrator may designate a lawyer permanently or temporarily employed by EPA and without any prior connection with the proceeding to serve as Presiding Officer.

### **§ 78.7 [Reserved]**

### **§ 78.8 Consolidation and severance of appeals proceedings.**

(a) The Environmental Appeals Board or Presiding Officer has the discretion to consolidate, in whole or in part, two or more proceedings under this part whenever it appears that a joint proceeding on any or all of the matters at issue in the proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party. Consolidation of proceedings under this paragraph (a) will not affect the right of any party to raise issues that might have been raised had there been no consolidation.

(b) The Environmental Appeals Board or Presiding Officer has the discretion to sever issues or parties from a proceeding under this part whenever it appears that separate proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party.

### **§ 78.9 Notice of the filing of petition for administrative review.**

The Administrator will publish in the FEDERAL REGISTER a notice stating that a petition for administrative review of a decision of the Administrator has been filed and specifying any request in the petition for an evidentiary hearing.